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SUPREME COURT, U.S.
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No. 03-1503 MAY 24 2004

In The
Supreme Court of the United States

ROBERT R. MONACO,

Petitioner,

v.

AMERICAN GENERAL ASSURANCE COMPANY, an Illinois corporation; AMERICAN GENERAL CORPORATION, a Texas corporation; WILLIAM LEARY; JOHN DOE; RICHARD ROE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Third Circuit violate the doctrine of Erie v. Tompkins, 304 U.S. 64 (1938) when it nullified decisions by the New Jersey Appellate Division interpreting the New Jersey Law Against Discrimination?

2. Did the Third Circuit improperly conclude that the plaintiff had failed to establish a *prima facie* case under the fourth prong of the McDonnell Douglas test by requiring that his skills and experience under the rubric "similarly situated" only be compared to one execute sales level although he was fully qualified for executive sales positions one level below the one he had held?

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Plaintiff-petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

CITATION TO OFFICIAL REPORTS OF OPINIONS

The opinion of the United States Court of Appeals for the Third Circuit appears at 1a to the Petition and is published.

The Opinion and Order of the United States District Court for the District of New Jersey appears at 34a and is unpublished.

STATEMENT OF JURISDICTION

Petitioner seeks this Court's review of the judgment entered on February 23, 2004 by the United States Court of Appeals for the Third Circuit, by a Petition for Writ of Certiorari pursuant to the jurisdiction conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

There are no Constitutional Provisions involved in this case.

STATEMENT OF THE CASE

Plaintiff Monaco was born on March 9, 1946. On June 2, 1975, the plaintiff began to work for United States Life Insurance Company as a sales representative for the New Jersey area selling term life and medical insurance.

In 1979, plaintiff Monaco held the title of Regional Group Manager or branch manger when he opened the New Jersey office for the defendant employer located in Chatham, New Jersey. As branch manager, he was responsible for the sales office with three sales representatives reporting to him as well as supervising a clerical support staff of five.

Asked in his May 23, 2002 deposition whether he performed the same supervisory functions that a sales/branch manager would perform, the plaintiff responded he had to bring in his own business working with general agents and "also had to make sure our reps. were doing their, you know, quota."

On January 1, 1988, the plaintiff was promoted to Vice President of the Eastern Region. In contrast to his position as branch manager where he was only responsible for insurance sales in New Jersey, plaintiff Monaco was given the responsibility for coordinating insurance sales from Maine to Virginia, including offices in Boston, Connecticut, New York, Philadelphia, New Jersey and Washington, D.C. Subsequently, the scope of his supervisory responsibilities were expanded to include coordinating sales activities in

Florida, Ohio and the adjacent states of Kentucky, Tennessee and West Virginia.

In 1997, United States Life was purchased by defendant AGAC. Following this purchase, plaintiff Monaco remained employed with AGAC as the Vice President for the Eastern Region.

In June 1999, the month in which the plaintiff was terminated at age fifty-three, eight sales vice presidents/branch managers reported directly to plaintiff Monaco, namely, Edward McDonald, Walter Schroeder, Ted Makuch, Richard Gawlak, Joseph Ficorilli, Paul Bouchard, Dale Brockman and Michael Lombardi.

Four of the eight sales vice presidents/branch managers that reported to the plaintiff were "sufficiently younger." Specifically, at the time of his discharge in June 1999, Edward McDonald was approximately 45 years of age, Walter Schroeder was approximately 47 years of age, Ted Makuch was in his mid-40s and Paul Bouchard was in his early-40s.

Prior to April 1999, plaintiff Monaco reported to J. Hugh Bailey, Senior Vice President of Sales and Marketing then 62 years of age. On May 3, 1999, defendant William Leary, then fifty years of age, replaced Mr. Bailey and became the immediate supervisor of the plaintiff.[1]

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[1] In the opinion below, the trial court erroneously states that defendant Leary was older than the plaintiff. In point of fact, he was three years younger than plaintiff Monaco.

On June 14, 1999, plaintiff Monaco was informed by defendant Leary that his employment with the defendant employer had been terminated effective June 30, 1999. The plaintiff was told that his position as the Vice President for the Eastern Region had been eliminated because the Eastern and Western Sales Regions had been consolidated.

On June 10, 1999, defendant Leary signed a Termination Review Committee Summary form to approve the plaintiff for termination. Defendant Leary also signed a Resignation/Termination Notice on June 14, 1999, which established the effective date of the plaintiff's termination. Subsequent to the termination of the plaintiff, defendant Leary assumed the oversight or supervisory functions for the Eastern Sales Region.

Although a key participant in the decision to terminate the plaintiff, defendant Leary failed to provide the plaintiff with an equal employment opportunity for executive sales positions. Specifically, he failed to compare the skills and experience of plaintiff Monaco with other employees who at the time of the Reduction in Force ("RIF") held sales vice president/branch manager positions. When asked during his June 5, 2002 deposition: "Now, at any time in this elimination period, anywhere from January 1999 to June 14, 1999, was consideration given to [plaintiff] Monaco for another position at [AGAC]?", defendant Leary responded: "No, not to the best of my knowledge."

When questioned whether he believed that the selection of the plaintiff for termination in the context of a reduction in force complied with corporate policy promising equal employment opportunities, defendant Leary stated he was unaware that such a policy existed. In response to an inquiry as to whether any analysis was made to determine if the reduction in force was conducted in an age biased manner, defendant Leary stated that he did not give any consideration as to whether the circumstances of the plaintiff's termination complied with age discrimination laws.

At the time plaintiff Monaco was involuntarily terminated, several older long term workers at AGAC were terminated while sales representatives in their early 30s were retained. Within three months of the termination of the plaintiff, Sales Vice President/Branch Manager Joseph Ficorilli, then 62 years of age, was demoted and replaced by Dan Morgan, a thirty year old sales representative. Within nine months of his termination, the Eastern and Western Sales Regions were reconstituted and the supervision of the Eastern Region was placed in the hands of Tom McKeller, an individual approximately two years younger than the plaintiff and not previously employed by the AGAC defendants.

Plaintiff Monaco commenced a legal action within the Superior Court of New Jersey, Monmouth County, Law Division, on June 11, 2001 by filing a complaint alleging that the AGAC defendants violated prohibitions against age discrimination contained in the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1, et seq., as well as a

corporate policy promising "equal employment opportunities" which the plaintiff contends is contractual in nature. At the heart of his complaint, plaintiff Monaco alleges that the failure of the AGAC defendants to provide him with the opportunity to fill another executive sales position for which he was qualified at the level of vice president/branch manager, was a violation of promises made and his reasonable expectations that, while employed, he would be the recipient of equal employment opportunities.

On August 2, 2001, the AGAC defendants removed this case from the Superior Court of New Jersey to the United States District Court for the District of New Jersey.

On August 9, 2001, the defendants filed an answer together with several affirmative defenses. A review of the affirmative defenses contained in their responsive pleading reveals that a reduction in force defense was not initially raised. On May 28, 2002, two and one half weeks short of the end of the discovery period, the AGAC defendants filed responses to the plaintiff's Interrogatories. As part of their responses, the AGAC defendants raised a reduction in force defense for the first time. As a consequence, plaintiff Monaco has had to rely on anecdotal evidence concerning the ages of other employees who were affected by the reduction in force, including the ages of similarly situated sufficiently younger sales executives retained by the defendant employer in positions for which the plaintiff was not given consideration when terminated.

On or about July 8, 2002, the respondents filed a Notice of Motion for Summary Judgment. The petitioner filed opposition papers on or about August 2, 2002.

On October 25, 2002, the United States District Court for the District of New Jersey granted summary judgment in favor of the defendants and the plaintiff appealed to the United States Court of Appeals for the Third Circuit. The Third Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291 based on an appeal from a final judgment of the United States District Court for the District of New Jersey rendered on October 25, 2002. The Third Circuit had subject matter jurisdiction pursuant to 28 U.S.C. § 1332 as the amount in controversy exceeds $75,000, exclusive of interest and costs, and the case involves citizens of different states.

ARGUMENT

I. The United States Court of Appeals for the Third Circuit violated the doctrine of Erie v. Tompkins, 304 U.S. 64 (1938) when it nullified decisions by the New Jersey Appellate Division interpreting the New Jersey Law Against Discrimination.

In the seminal case of Erie R. Co. v. Tompkins, 304 U.S. 64, 78, 82 L.Ed. 1188 (1938), this Court declared that:

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.

As a result, federal courts sitting in diversity are bound to apply the law of the state where the action arose. Since the plaintiff was employed and terminated in New Jersey, New Jersey law, as articulated by its Legislature and/or judiciary controls and must be applied.

Ordinarily, this Court does "not . . . grant petitions for certiorari solely to review what purports to be an application of state law. . . ." Leavitt v. Jane L., et al., 518 U.S. 137, 144, 135 L.Ed. 2d 443 (1996).

However, such petitions have previously been granted and will be granted in circumstances where a federal court blatantly disregards or otherwise nullifies the applicable governing state law. Id. at 144-145 (*citing* Steele v. General Mills, Inc., 329 U.S. 433, 438, 440-441, 91 L.Ed. 402 (1947); Wichita Royalty Co. v. City Nat. Bank of Wichita Falls, 306 U.S. 103, 107, 83 L.Ed. 515 (1939). The plaintiff-petitioner submits that, in the instant case, this Court should grant the petition for certiorari on the first issue for two distinct reasons. First, within its ruling, the United States Court of Appeals for the Third Circuit disregarded decisions by the New Jersey intermediate court of appeals which indicated that age discrimination claims should be analyzed differently than age discrimination claims under federal law. Second, the Committee on Model Civil Jury Charges, a committee which is appointed by and serves the New Jersey Supreme Court, recently revised the New Jersey Model Civil Jury charges in a way which clearly reflects that New Jersey law differs from federal law in the analysis of age discrimination claims.

A. The New Jersey Law Against Discrimination

Although plaintiff Monaco originally brought his complaint in state court solely alleging claims under the NJLAD, it was removed by the AGAC defendants on diversity grounds. While both the NJLAD and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq., were enacted to remedy discriminatory conduct by employers, as currently interpreted, the New Jersey statute is broader

in its remedial scope and is given a more liberal interpretation, particularly with respect to determining whether a plaintiff has carried his burden to establish a *prima facie* case under the McDonnell Douglas test when alleging age discrimination. Notwithstanding, the Third Circuit disregarded the two separate decisions by the New Jersey Appellate Division. See Monaco v. American General Assur. Co., 359 F.3d 296, 303 (3rd Cir. NJ 2004).

In its decision, the Third Circuit, contrary to reported decisions by the Appellate Division, interpreted the New Jersey Supreme Court's decision in Bergen Commercial Bank v. Sisler, 157 N.J. 188, 723 A.2d 944 (1999). Id. at 303. The Third Circuit held that, in the absence of a controlling decision by the New Jersey Supreme Court, it was to merely consider the decisions of "the state's intermediate appellate courts for assistance in predicting how the state's highest court would rule."[2] Id. *citing* Werwinski v. Ford Motor Co., 286 F.3d 661, 670 (3rd Cir. 2002)(quoting Gares v. Willingboro Twp., 90 F.3d 720, 725 (3rd Cir. 1996). Thus, on the grounds that the Third Circuit was free to interpret Sisler without being bound by any New Jersey intermediate appellate court, the Third Circuit then proceeded to overrule the decisions by the New Jersey Appellate Division in Petrusky v. Maxfli Dunlop

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[2] At oral argument, counsel for the petitioner was asked about certification to the New Jersey Supreme Court for a definitive statement on the fourth element of the *prima facie* case. Instead of utilizing this procedure, the Third Circuit chose to nullify decisions of New Jersey intermediate appellate courts. This is contrary to the observations of this Court in Salve Regina College v. Russell, 499 U.S. 225, 237, 113 L.Ed. 2d 190 (1991).

Sports Corp., 342 N.J.Super. 77, 775 A.2d 723 (App. Div. 2001) and Reynolds v. Palnut Co., 330 N.J. Super. 162, 748 A.2d 1216 (App. Div. 2000).

The test utilized by the court below -- that the plaintiff not only had to demonstrate that he was terminated while the defendant employer retained sufficiently younger employees, but also that he had to demonstrate that the employees retained were in similarly situated identical positions -- is at odds with New Jersey precedent holding that the burden to establish a *prima facie* case "is not onerous." See Bergen Commercial Bank v. Sisler, 157 N.J. 188, 211, 723 A.2d 944 (1999)(*citing* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 67 L.Ed.2d 207(1981).

The decision by the Third Circuit also fails to give any consideration whatsoever to the factual contentions raised by the plaintiff from which a trier of fact could reasonably infer the existence of age bias. Specifically, in the affidavit he filed in response to the defendants' motion for summary judgment, plaintiff Monaco declares that contemporaneous with his termination, a number of other long-term older AGAC employees were terminated while younger employees were retained. The plaintiff specifically identifies these older AGAC employees by name and approximate age. As a result, since New Jersey law is clear, this Court should reverse the holder by the Third Circuit.

B. New Jersey Model Civil Jury Charge § 2.21

Like most jurisdictions, New Jersey has established Model Jury Charges which are utilized in both criminal and civil litigation. In the civil context, since May of 1991, Charge 2.21 entitled "Discriminatory Employment Practices Under the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1. et seq.)" has been in existence and has not changed in any substantial manner. (48a) This Charge, along with Charge 2.22, in particular, Charge 2.22E, had been used in order to explain the *prima facie* case of discrimination under the NJLAD. (54a) Within the past few years, however, there has been considerable discussion as to whether or not the May 1991 version of Charge 2.21 was still proper in light of decisions by the intermediate state court of appeals in New Jersey as well as decisions by the New Jersey Supreme Court. See Vito A. Gagliardi, Jr. & Michael D. Sousa, *Revising Model Jury Charge § 2.21 The McDonnell Douglas 'Burden Shifting' Framework is an Unnecessary Burden in Employment Discrimination Cases*, NEW JERSEY LAW JOURNAL, Mar. 26, 2001. As a result, the Committee on Model Civil Jury Charges[3] ("the Committee"), reviewed the May 1991 version of Charge 2.21 and decided to extensively revise this jury charge. The revision was approved by the New Jersey Supreme Court and was officially adopted in May 2003. (56a)

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[3] Pursuant to the provisions of R. 1:35-2(d) of the Rules of General Application in the State of New Jersey, the New Jersey Supreme Court has the authority to "appoint such committees as it shall deem necessary or desirable . . . ."

Under the revised Charge 2.21, the Committee reflected the views of the New Jersey Supreme Court that the first two stages of the McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed. 2d 668 (1973) *prima facie* case be decided by the court and not by a jury. (56a) Most importantly, in claims of discrimination brought under the NJLAD, the Committee clearly noted that the fourth element of the *prima facie* case varies depending on the particular circumstances of the case.[4] Finally, the Committee retained Charge 2.22E entitled "Discriminatory Layoff or Reduction in Force (RIF)" where the claim, as in the present case, involved a reduction in force. (54a) Under these circumstances, a plaintiff establishes a *prima facie* case in a RIF case if they can also show by a preponderance of the evidence that: "(1) He/She is a member of a protected class; and (2) He/She was laid off while other[s] not in the protected class were treated [more] favorably." It is clear that, under New Jersey law, plaintiff Monaco established a *prima facie* case of discrimination based on age in the context of a RIF.

As held by the New Jersey Supreme Court in Sisler, the language of the NJLAD provides substantive authority for New Jersey courts to deviate from the

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[4] In a claim of failure to hire based on age, the New Jersey Model Civil Jury Charge states that the plaintiff must establish that the "defendant hired a person who was sufficiently younger/older to raise a question as to age discrimination or [that] the position remained open and defendant continued to seek applicants with qualifications similar to plaintiff's" or [that] the plaintiff was not hired under circumstances that would give rise to an inference of discrimination." (Emphasis added).

standard of proof the Third Circuit may require in order to meet the fourth prong of the McDonnell Douglas test to establish a *prima facie* case under ADEA and particularly when the plaintiff employee has been terminated in the context of a RIF.

As explicated by the New Jersey Appellate Division in Petrusky v. Maxfli Dunlop Sports Corp., 342 N.J.Super. 77, 775 A.2d 723 (App. Div. 2001), the burden to establish the fourth prong of a *prima facie* case under the McDonnell Douglas test in NJLAD cases is to be liberally construed. Relying upon the decision in Sisler, as well as the decision in Reynolds v. Palnut Co., 330 N.J. Super. 162, 748 A.2d 1216 (App. Div. 2000), the Petrusky court held with respect to the fourth prong that: "The focal question is not necessarily how old or young the claimant or his replacement was, but rather whether the claimant's age, in any significant way, made a difference in the treatment he was accorded by his employer." 227 F. Supp.2d at 300.

In its opinion, the Third Circuit ignored the well reasoned opinion set forth in the recent case entitled Wright v. L-3 Communication Corp., 227 F.Supp.2d 293 (N.J. 2002) where District Judge Stephen M. Orlofsky found that the fourth prong of the three stage McDonnell Douglas test had been modified by the New Jersey Appellate Division in Petrusky. Specifically, the court in Wright held that, if the claimant or plaintiff was able to show his age "in any significant way, made a difference in the treatment he was accorded by his employer," then he has met the fourth prong of the McDonnell Douglas test to establish a *prima facie* case. 227 F.Supp.2d at 229-230.

In another part of his decision, Judge Orlofsky underscored the fact that age bias is a subtle form of discrimination and therefore justifies a more liberal approach to the plaintiff's requirement to establish a *prima facie* case of age discrimination. Quoting Sisler, 157 N.J. at 212-213 (which, in turn, quoted McCorstin v. United States Steel Corp., 621 F.2d 749, 754 (5th Cir. 1980), the court in Wright observed:

> Seldom will a sixty-year-old be replaced by a person in the twenties. Rather, a sixty-year-old will be replaced by a fifty-five year old, who, in turn, is succeeded by a person in the forties, who will also be replaced by a younger person.

227 F. Supp.2d at 300.

The court in Wright further held that a plaintiff asserting that the NJLAD was violated because of age does not have to show he is similarly situated in terms of the qualifications and positions of younger employees retained. 227 F. Supp.2d at 302. In so ruling, Judge Orlofsky cited the decision by the Court of Appeals in Marzano v. Computer Sciences Corp., Inc., 91 F.3d 497, 510 (3rd Cir. 1996) for the proposition that: "[T]he fact that similarly situated employees are retained may bolster a party's case, but that a plaintiff need not make such a showing to establish a *prima facie* case." 91 F.3d at 510.

Finally, the court in Wright opined that, under New Jersey case law, yet another way that a plaintiff can establish the fourth prong of his *prima facie* case

under the McDonnell Douglas test is to show that the employer sought other persons to perform the same work that the plaintiff was capable of handling after the plaintiff was removed from his position. 227 F.Supp.2d at 301, citing Petrusky, 342 N.J. at 80; see also Catalaine v. Gilin Instrument Corp., 271 N.J. Super. 476, 496-497, 638 A.2d 341 (App. Div. 1994), cert. denied, 136 N.J. 298, 642 A.2d 1006 (1994); Murray v. Newark Housing Authority, 311 N.J. Super. 163, 172, 709 A.2d 340 (Law Div. 1998)(holding that the fourth prong was met where the plaintiff can show that "other younger workers were treated more favorably.")

In the instant case, plaintiff Monaco has clearly presented sufficient facts to meet the more liberal standard under the NJLAD to satisfy the fourth prong of the McDonnell Douglas test. He was clearly qualified to handle the position of sales vice president/branch manager because it is undisputed that the plaintiff held a substantially similar position during the years 1979 through 1988 before he was promoted to Vice President for the Eastern Region. There is also evidence in the record that, although the Eastern and Western Sales Regions were allegedly consolidated, the supervisory functions for the Eastern Region previously handled by the plaintiff were, in fact, handled in part by defendant Leary, a recent hire by defendant AGAC and a person who was three years younger than the plaintiff. Moreover, it is undisputed that the Eastern and Western Sales Regions were reconstituted within nine months after the plaintiff's termination and the supervisory functions were given to another new hire who was at least two years younger than the plaintiff.

Plaintiff Monaco also has established that, in violation of the statutory provision made part of the NJLAD stating he has a civil right to retain employment without discrimination because of age and in the face of a corporate policy providing that all employees are to be afforded equal employment opportunities, the AGAC defendants did not compare his skills, experience and other qualifications with the eight sales vice president/branch manager positions at the time they implemented a RIF. It is also undisputed that, at the same time plaintiff Monaco was terminated, a number of other older employees assigned to the Eastern Region were also terminated while younger employees were retained.

Yet another indication of age bias on the part of the AGAC defendants is the fact that, within three months of the plaintiff's termination, the vice president/branch manager in the Cincinnati area was demoted because of his performance and he was replaced by a thirty year old sales representative. This constitutes a powerful piece of circumstantial evidence that had plaintiff Monaco been compared with the other sales vice president/branch manager positions, he would have been given the sales executive position in the Cincinnati area to replace Joseph Ficorilli rather than Dan Morgan, a thirty year old employee.

In sum, the Third Circuit violated the doctrine of Erie v. Tompkins when it gave a narrow scope to the fourth element under the McDonnell Douglas test inconsistent with New Jersey appellate decisions interpreting the NJLAD and Model Civil Jury Charges sanctioned by the New Jersey Supreme Court. The

facts of this case should have compelled the Third Circuit to find that plaintiff Monaco had met the flexible fourth prong of the McDonnell Douglas test to establish a *prima facie* case of age discrimination under the NJLAD as articulated by New Jersey's intermediate appellate court as well as indirectly by the New Jersey Supreme Court through the recent extensive revisions to the Model Jury Charge 2.21.

II. The Third Circuit improperly concluded that the plaintiff had failed to establish a *prima facie* case under the fourth prong of the McDonnell Douglas test by requiring that his skills and experience under the rubric "similarly situated" only be compared to one execute sales level although he was fully qualified for executive sales positions one level below the one he had held.

In Anderson v. Consolidated Rail Corp., 297 F.3d 242 (3rd Cir. 2002), the Third Circuit addressed the burden to establish the fourth prong of the third stage of the McDonnell Douglas test in cases brought under 29 U.S.C. 623(a)(1). At the heart of the decision in Anderson is the following holding:

> Because ADEA is not a bumping statute, as the plaintiffs concede, the plaintiffs must show that the employer retained a similarly situated employee. Were we to hold otherwise, we would be construing ADEA as guaranteeing a protected employee a job at the expense of a sufficiently younger employee. Thus, to

> present a *prima facie* case raising an inference of age discrimination in a reduction in force situation, the plaintiff must show, as part of the fourth element, that the employer retained someone similarly situated to him who was sufficiently younger.

297 F.3d at 251.

The Anderson court further held that, only if the employer "engaged in routine shuffling," that such a practice should be considered "in determining whether a younger person was similarly situated to a discharged employee."[5] Id.

In Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344 (6th Cir. 1998), the Sixth Circuit addressed the claims of an ADEA plaintiff who was terminated allegedly due to his age and denied the opportunity of a transfer because of his age. 154 F.3d at 348. With respect to his second claim, the plaintiff alleged that several months after his termination, the defendant eliminated two other positions and permitted the employees to internally transfer to new positions. 154 F.3d at 351. The District Court found that the plaintiff

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[5] There is no question but that the plaintiff has established that there were at least four sufficiently younger employees in executive sales positions who were retained while he was terminated. Thus, the only issue, assuming the case had been brought under ADEA, which it was not, is whether the eight sales vice president/branch manager positions were similarly situated with respect to the qualifications, skills and experience of the plaintiff.

did not establish a *prima facie* case because he "was not similarly-situated to either [of the two employees] who[] performed the same job functions as [the plaintiff] . . . ." Id. at 352.

The Court of Appeals held that the District Court misconstrued the applicable precedent by narrowly interpreting the term "similarly situated." Id. According to the Sixth Circuit, "similarly situated" does not mean that there should be a comparison between "every single aspect of a person['s] employment." Id. Instead, a plaintiff need only show a comparison between "the *relevant* aspects of his employment situation." Id. *citing* Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796 (6th Cir. 1994).

The facts in the Anderson case are substantially different than the facts in the case at bar. In Anderson, ten of the plaintiffs who appealed the district court decision stating that they had not been able to demonstrate that they were discharged while younger persons were retained "attempted to satisfy the fourth element by comparing themselves to entry level positions or other low level positions without providing any evidence of shuffling." 297 F.3d at 251. In the instant case, however, the comparison sought is between the plaintiff who held an executive sales vice president position with other employees who held executive sales vice president/branch manager positions, the very same job position the plaintiff had previously held before he had been promoted to Vice President of the Eastern Region. In addition, the defendant employer here promulgated and adopted a corporate policy which promises equal employment

opportunities to existing employees consistent with state and local discrimination laws.

If, in fact, the fourth prong of the McDonnell Douglas test to establish a *prima facie* case requires the aggrieved employee to show that his employer had retained similarly situated significantly younger employees when he was terminated, the term "similarly situated" should not be narrowly construed as in Anderson, but instead given reasonable scope so as to encompass employees who had previously performed the same job functions by the younger less experienced employee retained and had been promoted to a higher executive position one level above that of other sales executive job positions to which he should have been compared in the context of a RIF. This should be particularly the case where there simply is no identical similarly situated positions to which a plaintiff could be compared in order to retain employment consistent with the stated purpose of ADEA.

It is self-evident that if this Court countenances the narrow reading given to "similarly situated" by the Third Circuit, the resulting mischief will be open season for employers to manipulate RIFs so as to block the ability of the discharged employee to assert age discrimination. Unscrupulous employers will then have license to transfer older employees who are the target of age biased terminations into dead-end job positions for a period of a few months, eliminate such positions as part of the RIF and then argue that there were no similarly situated jobs for which he could have been compared in order to retain employment. The

plaintiff submits that the proper approach is that taken by the Sixth Circuit which affords a more expansive view to the term "similarly situated." In Ercegovich, the Sixth Circuit made an observation which should govern the decision of this Court to grant certiorari to remedy the use of the term "similarly situated" as the justification for dismissing ADEA claims by imposing a Draconian level of proof for the fourth prong of the McDonnell Douglas test that: "If the non-protected employee to whom the plaintiff compares himself or herself must be identically situated to the plaintiff in every single aspect of their employment, a plaintiff whose job responsibilities are unique to his or her position will *never* successfully establish a prima facie case (absent direct evidence of discrimination)." 154 F.3d at 353. (Emphasis in the original)

It is undisputed that the promise of equal employment opportunity was part of the terms, conditions and privileges of employment enjoyed by the employees of defendant AGAC. As such, plaintiff Monaco was entitled to the opportunity of being compared in a RIF situation with other employees who had the same or similar qualifications and who held the same executive sales position which he had held before being promoted to Vice President of the Eastern Region. The existence of this corporate policy promising equal employment opportunities to the existing employees of defendant AGAC should be deemed sufficient to require a comparison of experience and skills of more than one level of sales executives consistent with this Court's holding in Burdine that, to establish the fourth prong of the McDonnell Douglas test is not onerous.

In stark contrast to the Anderson plaintiffs, plaintiff Monaco does not concede or agree that either the NJLAD or the ADEA as enacted by the respective state and federal legislatures failed to incorporate the concept of "bumping." Indeed, this proposition is in contravention to both the Congressional purpose and the remedies made available under the ADEA. As stated in Section 621(a)(1), 29 U.S.C. 621(a)(1) of ADEA, Congress found and declared that: "[O]lder workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs." In Section 626(b) of ADEA, Congress specifically provides that: "[T]he court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of [ADEA], including without limitation judgments compelling employment, reinstatement or promotion." 29 U.S.C. 626(b).

There is little precedent to deal with the issue of "bumping." However, a New Jersey Appellate Division case cites substantial authority in the context of a civil rights cause of action with the proposition that bumping would be appropriate under certain circumstances. Granziel v. City of Plainfield, 279 N.J. Super. 104, 652 A.2d 227 (App. Div. 1995) citing precedent such as Jackson v. City of Albuquerque, 890 F.2d 225, 233-234 (10th Cir. 1989) which, in turn, cited Sterzing v. Fort Bend Ind. School Dist., 496 F.2d 92, 93 (5th Cir. 1974) for the following common sense proposition which should make short shift of the "fear of bumping" that permeates the decision in Anderson:

> If the existence of a replacement constituted a complete defense against reinstatement, the reinstatement could be effectively blocked in every case merely by hiring an innocent third party after the retaliatory purpose was achieved. Thus, the deterrent effect of the remedy of reinstatement would be rendered a nullity. . . . While reinstatement may displace an innocent employee, the A[e]nforcement of constitutional rights [may have] disturbing consequences. Relief is not restricted to that which would be pleasing and free of irritation.

Granziel, 279 N.J. Super. at 111.

Therefore, it is respectfully submitted that the Third Circuit was in error when it narrowly construed the term "similarly situated" as utilized in Anderson. Because the issue of what is the scope of "similarly situated" is one with respect to which there is a conflict between the Circuits. The issue raised by this Petition is appropriate for review by this Court.

CONCLUSION

For the foregoing reasons, the Petitioner submits that this Court should grant review in this case to reverse the holding of the United States Court of Appeals for the Third Circuit. The Petitioner would also ask this Court to remand this case to the District Court for further proceedings.

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-4190

ROBERT R. MONACO,

Appellant

v.

AMERICAN GENERAL ASSURANCE COMPANY, an Illinois corporation; AMERICAN GENERAL CORPORATION, a Texas corporation; WILLIAM LEARY; JOHN DOE; RICHARD ROE

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 01-03642)
Honorable Mary Little Cooper,
District Judge

Argued January 13, 2004

BEFORE: MCKEE, SMITH, and GREENBERG, Circuit Judges

[ENTERED: FEBRUARY 23, 2004]
(Filed: February 23, 2004)

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OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. FACTUAL AND PROCEDURAL HISTORY

This matter comes on before this court on Robert Monaco's appeal from an order entered by the district court on October 25, 2002, granting appellees' motion for summary judgment. Monaco brought this action against his former employer, its corporate parent, and certain of his former co-employees, alleging that they discriminated against him on the basis of his age when his employer laid him off as part of a company-wide reduction in force on June 30, 1999. In addition, he

asserted breach of contract claims against the corporate defendants.

Monaco was born on March 9, 1946. On June 2, 1975, he began working for United States Life Insurance Company ("United States Life") as a sales representative for the New Jersey area selling term life and medical insurance. United States Life promoted him in 1979 to regional group manager in which position he was responsible for opening the New Jersey regional office in Chatham and oversaw the sales representatives and clerical staff in that office. In 1988 United States Life promoted him again, this time to regional vice president in charge of the Eastern Region, a position in which he coordinated insurance sales in several states along the eastern seaboard. During his tenure as regional vice president his employer expanded his territory to include several additional states.

In 1997, American General Assurance Company ("AGAC") purchased United States Life. After the AGAC acquisition, Monaco remained the vice president in charge of the Eastern Region. Prior to April 1999, J. Hugh Bailey ("Bailey"), senior vice president of sales and marketing, then age 62, was Monaco's immediate supervisor, but in May 1999, William Leary ("Leary"), age 50, replaced Bailey, who was retiring, in that capacity. In late 1998, AGAC determined that its medical insurance line of business was incurring large losses, a circumstance which led it to decide to exit this product line. Notwithstanding its unprofitably, inasmuch as sales of medical insurance constituted a significant portion of the sales volume in

the Eastern Region, AGAC determined to cut expenses by consolidating its operations and reducing its workforce.

When AGAC laid off Monaco on June 30, 1999, he was age 53. At that time AGAC had two regional vice presidents, Monaco, who was vice president of the Eastern Region, and Robert Shaw ("Shaw") age 55, who was vice president of the Western Region. Shaw and Monaco had identical responsibilities in the two different regions. In June 1999, AGAC had eight sales vice presidents/branch managers who reported directly to Monaco: (1) Edward McDonald in Danbury, Connecticut, approximately age 45; (2) Walter Schroeder for the New England Region, approximately age 47; (3) Ted Makuch in New York, in his mid-40s; (4) Richard Gawlak in the Philadelphia area, approximately age 50; (5) Joseph Ficorilli in the Cincinnati area, approximately age 62; (6) Paul Bouchard in the Florida area, in his early 40s; (7) Dale Brockman in New Jersey, approximately age 50; and (8) Michael Lombardi in charge of double override agencies, approximately age 64.

On June 14, 1999, when Leary informed Monaco that AGAC was laying him off effective June 30, 1999, he explained that it was doing so because it was eliminating his position of vice president for the Eastern Region as it was consolidating its Eastern and Western Regions under Shaw's control. At the time of Monaco's layoff, AGAC also laid off several other employees as part of a company-wide reduction in force. Following Monaco's layoff, Shaw assumed the day-to-day management of the Eastern Regional sales

office but Leary also provided oversight of the Eastern Region.

In April 2000, AGAC hired Tom McKellar, who was born on April 26, 1948, and is approximately two years younger than Monaco, as national vice president of sales. McKellar worked out of the New Jersey office and was responsible for national sales and other senior management duties in addition to overseeing the Eastern Regional sales offices.

On June 11, 2001, Monaco brought this action in the Superior Court of New Jersey against his former employer, AGAC, and its parent corporation, American General Corporation, as well as his supervisor, Leary, and two unnamed AGAC employees, John Doe and Richard Roe, charging all defendants with age discrimination, directly or as aiders and abettors, under the New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-1 et seq. (West 2002) ("NJLAD").[1] In addition, he asserted claims against the corporate defendants for breach of contract. Defendants removed the case to the district court on the basis of diversity of citizenship and subsequently moved for summary judgment. On October 25, 2002, the district court granted the defendants' motion, concluding with respect to his age discrimination claim that while Monaco could satisfy the first three elements of the McDonnell Douglas (McDonnell Douglas Corp.

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[1] Inasmuch as Monaco never sought to replace the John Doe and Richard Roe defendants with the names of actual AGAC employees we will not address any claims made against them. See Garvin v. City of Philadelphia, 354 F.3d 215 (3d Cir. 2003).

v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973)) prima facie case test, he could not satisfy the fourth element. It also granted summary judgment to the corporate defendants on Monaco's breach of contract claim. Monaco then brought this appeal.

II. JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1332 inasmuch as the parties are of diverse citizenship and the amount in controversy exceeds $75,000, exclusive of interest and costs.[2] We have jurisdiction pursuant to 28 U.S.C. § 1291.

III. DISCUSSION

A. STANDARD OF REVIEW

We exercise plenary review of the district court's order granting summary judgment to defendants. See Fakete v. AETNA, Inc., 308 F.3d 335, 337 (3d Cir. 2002) (citing Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 566 n.3 (3d Cir. 2002)).

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[2] When we reviewed this case we questioned whether the parties were of diverse citizenship and thus we directed them to make submissions on this point. We now are satisfied that the parties are of diverse citizenship and there is diversity of citizenship jurisdiction in this case.

B. THE REQUIREMENTS OF THE NEW JERSEY LAW AGAINST DISCRIMINATION COMPARED TO THOSE OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Monaco asserts that the requirements to set forth a prima facie case under the NJLAD are less stringent than those required in similar cases under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), a statute not involved directly in this case brought solely under New Jersey law. In particular, he contends that he does not have to make a showing that AGAC retained a sufficiently younger employee for him to establish a prima facie case, though an action under the ADEA would have required that he make such a showing. Appellees contend, however, that Monaco has waived this argument because in his brief in opposition to their motion for summary judgment he stated that to determine if the fourth element of the prima facie case step of the McDonnell Douglas burden shifting framework had been satisfied the court should look to "whether the plaintiff is discharged while the defendant retained similarly situated sufficiently younger persons in comparable job positions," J.A. at 293-94, seemingly relying on a McDonald Douglas formulation of that element. Appellees' br. at 11 n.3. But it does not matter whether Monaco waived his argument that he has a lesser burden under the NJLAD than he would have had under the ADEA with respect to the fourth element of the McDonnell Douglas test as we conclude that the two statutes contain similar

requirements for proving the fourth element of a plaintiff's prima facie case.[3] Thus, his argument is to no avail.

Under the ADEA, it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). The protection against age discrimination in the ADEA is "limited to individuals who are at least 40 years of age." Id. § 631(a). When, as here, a plaintiff alleges that he has suffered age discrimination predicated on disparate treatment, liability under the ADEA depends on whether age "actually motivated the employer's decision." Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 113 S.Ct. 1701, 1706 (1993); see also Raytheon Co. v. Hernandez, 124 S.Ct. 513, 519 (2003).[4] The NJLAD, though worded differently, similarly makes age discrimination unlawful but does not limit its protections to persons at least 40 years of age. In cases brought under either the ADEA or the NJLAD, the plaintiff's age actually must have played a role in the employer's decision making process and had a determinative influence on the outcome of that process. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141, 120 S.Ct. 2097, 2105 (2000); Bergen

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[3] We doubt that he in fact made such a waiver.

[4] Monaco does not attempt to advance a disparate impact argument.

Commercial Bank v. Sisler, 723 A.2d 944, 953 (N.J. 1999).

Under both the ADEA and the NJLAD, a plaintiff may meet his or her burden by (1) presenting direct evidence of discrimination that meets the requirements of Justice O'Connor's concurring opinion in Price Waterhouse v. Hopkins, 490 U.S. 228, 261, 109 S.Ct. 1775, 1796 (1989),[5] or (2) presenting indirect evidence of discrimination that satisfies the familiar three-step burden shifting framework identified in McDonnell Douglas. Fakete, 308 F.3d at 337-38; Sisler, 723 A.2d at 954. Inasmuch as Monaco attempted to prove his case solely through the use of indirect evidence, our analysis will focus on the burden shifting framework of McDonnell Douglas as applied under the NJLAD.

The Supreme Court of New Jersey has explained the three-step burden shifting analysis "as a starting point" for analysis of claims under the NJLAD. Sisler, 723 A.2d at 955. Under this analysis a plaintiff first must establish a prima facie case, the step at which Monaco lost his case in the district court. If the plaintiff does so the burden shifts to the defendant to articulate a legitimate non-discriminatory reason for the adverse employment action. Mogull v. CB Commercial Real Estate Group, Inc., 744 A.2d 1186, 1197-98 (N.J. 2000).

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5 We have regarded Justice O'Connor's opinion as controlling, see Fakete, 308 F.3d at 337 n.2, but we note that in Desert Palace, Inc. v. Costa, 123 S.Ct. 2148, 2153 (2003), the Court declined an opportunity to indicate which opinion in Price Waterhouse was controlling.

Then, if the defendant meets this rather light burden, the plaintiff must discredit the defendant's proferred reason for its action or adduce evidence that discrimination was more likely than not a motivating or determinative cause of the adverse employment action. See Potence v. Hazleton Area Sch. Dist., No. 03-1535, F.3d , 2004 WL 188083, at *2 (3d Cir. Feb. 2, 2004) (ADEA case).

In an ordinary employment termination case under the ADEA to establish a prima facie case of age discrimination at the first step of the McDonnell Douglas burden shifting framework a plaintiff must show that he or she: (1) was a member of the protected class, i.e., was over 40, (2) was qualified for the position, (3) suffered an adverse employment decision, and (4) ultimately was replaced by a person sufficiently younger to permit an inference of age discrimination. Duffy v. Paper Magic Group, Inc., 265 F.3d 163, 167 (3d Cir. 2001). In the context of a reduction in force, in order to satisfy the fourth element of a prima facie case under the ADEA, a plaintiff must show that the employer retained a sufficiently younger similarly situated employee. Anderson v. Consol. Rail Corp., 297 F.3d 242, 249-50 (3d Cir. 2002).

As we have indicated, however, Monaco maintains that the NJLAD does not require him to show that AGAC retained a sufficiently younger employee in order for him to make out a prima facie case of age discrimination in a reduction-in-force case and thus it differs from the ADEA. His failure to make this showing led the district court to grant the appellees' motion for a summary judgment. In support

of this argument Monaco cites Sisler, 723 A.2d at 956, Petrusky v. Maxfli Dunlop Sports Corp., 775 A.2d 723 (N.J. Super. Ct. App. Div. 2001), and Reynolds v. Palnut Co., 748 A.2d 1216 (N.J. Super. Ct. App. Div. 2000).

The NJLAD provides, in pertinent part, that "[a]ll persons shall have the opportunity to obtain employment . . . without discrimination because of . . . age . . . . This opportunity is recognized as and declared to be a civil right." N.J. Stat. Ann. § 10:5-4 (West 2002). It further states, in relevant part that:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:
>
> a. For an employer, because of the . . . age . . . of any individual . . . to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.
>
> . . .

Id. § 10:5-12.

In general, to establish a prima facie case under the NJLAD for unlawful termination, and thus satisfy the first step of the burden shifting analysis, a plaintiff

must demonstrate that he or she: (1) belongs to a protected class, (2) was qualified for the position held, (3) was terminated despite adequate qualifications, and (4) after termination the position remained open and the employer continued to seek applications. See Sisler, 723 A.2d at 955 (citations omitted). Of course, the NJLAD makes it unlawful for an employer to terminate an employee for numerous reasons in addition to age and thus is much more than an age discrimination statute.

In Sisler, a bank vice president brought a claim of age discrimination under the NJLAD, alleging tha. his employer wrongfully discharged him because of his youth, an unusual action that conceptually was possible because, as we have indicated, in contrast to the ADEA, the NJLAD does not limit the individuals protected from age discrimination to persons over the age of 40. Id. at 950. In Sisler the Supreme Court of New Jersey stated that under the NJLAD in an age discrimination case, the fourth element of the McDonnell Douglas prima facie case analysis:

> properly focuses not on whether the replacement is a member of the protected class but on 'whether the plaintiff has established a logical reason to believe that the decision rests on a legally forbidden ground.' Thus, under the [NJ]LAD, which specifies no qualifying age, courts have modified the fourth element to require a showing that the plaintiff was replaced with 'a candidate sufficiently younger to

> permit an inference of age discrimination.'

Id. at 956 (citations omitted) (emphasis added). Obviously the reference to a younger replacement could not have been intended to apply when an employee is discharged on account of his or her youth because in that situation his or her burden to establish a prima facie case quite logically is to show that the replacement employee was "sufficiently older to permit an inference of age discrimination." Id. at 959. It is apparent that the court in Sisler refined the fourth element of the requirements for a prima facie case in age discrimination situations that it had set forth for application in NJLAD cases in general.

We recognize, however, that the court's focus in Sisler was not on the fourth element of the McDonnell Douglas framework, but on the first element, i.e., how to modify the requirement that an individual belong to a protected class when the claimant brings a charge of age discrimination on the basis of youth. Id. at 956-57. The Sisler court held that in order to satisfy the first element, claimants such as Sisler must show background circumstances supporting the suspicion that the defendant is "the unusual employer who discriminates against the majority." Id. at 957.[6]

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[6] Notwithstanding opinions so suggesting it may not be so unusual for employers to discriminate against the majority because an employer might do exactly that to satisfy demands for diversity in its work force, to promote affirmative action, or because the employer for other reasons prefers to hire an individual who is not in the majority.

Nevertheless we are not at liberty to ignore Sisler's language recognizing the necessity of a sufficient age differential between the terminated and replacement employees for the plaintiff to establish a prima facie case of age discrimination demonstrating the presence of its fourth element.

In Petrusky, 775 A.2d at 725-26, and Reynolds, 748 A.2d at 1219-20, on which Monaco relies, the Appellate Division of the Superior Court of New Jersey, the intermediate state court of appeals, addressed the application of Sisler to cases involving allegations of traditional age discrimination brought by older employees. In both cases the Appellate Division declined to adopt the formulation of the fourth element of the prima facie case in the language we have quoted from Sisler regarding age discrimination cases, holding instead that the Supreme Court of New Jersey's analysis in that case was limited to cases involving allegations of reverse discrimination. Petrusky, 775 A.2d at 725; Reynolds, 748 A.2d at 1219. The court in Reynolds held that in cases involving a "traditional age discrimination claim" a plaintiff:

> need not show that he was replaced by someone sufficiently younger. Rather, plaintiff must show that he was a member of a protected class, that he was performing the job at a satisfactory level; that he was discharged, and that the employer sought others to perform the work after the complainant had been removed.

Id. The court in Petrusky adopted the Reynolds court's interpretation of Sisler. See Petrusky, 775 A.2d at 725 ("We adhere to that view and regard it as governing until the Supreme Court declares otherwise.").

Two cases in the district court have espoused divergent views on whether to follow the interpretation of Sisler that Reynolds and Petrusky set forth. In Wright v. L-3 Communications Corp., 227 F. Supp. 2d 293, 294-95 (D.N.J. 2002), the court held that in order to satisfy the fourth element of a prima facie case of age discrimination under the NJLAD, a plaintiff "must only show that his employer sought others to perform the same work after he was terminated from his position." On the other hand, earlier, in Swider v. Ha-Lo Indus., Inc., 134 F. Supp. 2d 607, 625 (D.N.J. 2001), the court held that under the NJLAD, "in order to satisfy the fourth prong of the McDonnell Douglas prima facie case, plaintiff must show that he was replaced by someone sufficiently younger to create an inference of unlawful age discrimination." We are impressed with the comprehensive analysis in Swider which points out that the Appellate Division itself has not interpreted Sisler consistently. In this regard, Swider cites Williams v. Pemberton Township Pub. Schs., 733 A.2d 571, 577 (N.J. Super. Ct. App. Div. 1999), in which the court quoted Sisler for the point that under the NJLAD the fourth element of a prima facie case requires a showing that the plaintiff was replaced with "a candidate sufficiently younger to permit an inference of age discrimination."

Of course, in light of the circumstance that we are applying state law we recognize that we are bound by the opinions of the state's highest court, Gares v. Willingboro Township, 90 F.3d 720, 725 (3d Cir. 1996), though "[i]n the absence of guidance from [it], we are to consider decisions of the state's intermediate appellate courts for assistance in predicting how the state's highest court would rule." Werwinski v. Ford Motor Co., 286 F.3d 661, 670 (3d Cir. 2002) (quoting Gares, 90 F.3d at 725). Thus, we have given careful consideration to Petrusky and Reynolds. Nevertheless, after analyzing these Appellate Division cases, we conclude that the district court in Swider was correct and agree with it "that the Reynolds court misconstrued the standard in Sisler." Swider, 134 F. Supp. 2d at 623.[7] To us it is clear from Sisler that when the Supreme Court of New Jersey set out the fourth element of the McDonnell Douglas prima facie case framework in an age discrimination case it regarded that standard as applicable in both traditional and reverse age discrimination cases, the difference being that in a traditional case the replacement employee must be sufficiently younger than the replaced employee and in a Sisler reverse discrimination situation the replacement employee must be sufficiently older than the replaced employee.

When the Sisler court explained the fourth element it was following the analysis of prior cases as to what was required to establish a prima facie case in an age discrimination context. As set forth above, the

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[7] The district court decided Swider before the Appellate Division decided Petrusky.

Supreme Court of New Jersey in Sisler specifically stated that, "under the [NJ]LAD, which specifies no qualifying age, courts have modified the fourth element to require a showing that the plaintiff was replaced with 'a candidate sufficiently younger to permit an inference of age discrimination.'" 723 A.2d at 956 (citation omitted) (emphasis added).[8] Nothing in Sisler suggests that the principles underlying this modest modification are applicable only in cases involving reverse age discrimination and we see no reason to limit the holding of the Supreme Court of New Jersey to those cases as it would not be logical to do so. See Swider, 134 F. Supp. 2d at 624 (stating that under Sisler "[t]he fourth prong remains unchanged in age discrimination cases, whether they be traditional or reverse"). Indeed, the modification, as literally stated, could not be applicable in a case in which the employer is terminating the employee by reason of youth as in such a case it would be inconsistent with the discriminatory act for an employer to hire an even younger replacement. Thus, we are at a loss to understand how the Appellate Division limited Sisler's articulation of the fourth element of a prima facie case to cases involving reverse age discrimination.

In declining to follow Reynolds and Petrusky we point out that they lead to an absurd result. If a plaintiff only need show, as these cases indicate, to

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[8] In fact, as we have indicated, in cases involving allegations of reverse age discrimination under the NJLAD, a plaintiff would be required to show that the individual who replaced him or her was sufficiently older in order to infer discrimination on the basis of youth.

make out a prima facie case of age discrimination that he or she was a member of the protected class, performed satisfactorily, but was discharged following which the employer sought a replacement employee then, in view of the circumstance that the NJLAD does not include a 40-year old age threshold, practically every terminated employee would be able to establish a prima facie case of age discrimination.[9] Thus, Reynolds and Petrusky require that a court find that a plaintiff has established a prima facie case of age discrimination even though none of the four elements of his or her prima facie case in any way relates to the plaintiff's age.

Such a result would fly in the face of the requirement set forth in O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311-12, 116 S.Ct. 1307, 1310 (1996) (citation omitted), that "there must be a least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption.'" Moreover, the result would be at odds with the recognition in Sisler that a prima facie case analysis focuses "on whether the plaintiff has established a logical reason to believe that the decision rests on a legally forbidden ground." Sisler, 723 A.2d at 956 (internal quotation marks and citation omitted). Furthermore, the presumed age discrimination would

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[9] There are some limited exceptions. See Sisler, 723 A.2d at 952.

be generic because the plaintiff under Sisler could be either too young or too old.[10]

Overall we are satisfied that we should apply the same standard for the fourth element of Monaco's prima facie case under the NJLAD as we would have applied under the ADEA if he had brought his case under that statute. Thus, we look to the ages of the remaining similarly situated employees to compare them to Monaco to see if he has established the existence of that element. See Anderson, 297 F.3d at 249-50; Sisler, 723 A.2d at 956.[11] We are convinced that Sisler compels this result. Of course, as we explain below, we apply this element in a way to make it relevant in this reduction-in-force situation.

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[10] Under Reynolds and Petrusky a 35-year old terminated individual usually could demonstrate a prima facie case of age discrimination under the NJLAD even though he or she is so young that the ADEA would be inapplicable in the case but so old that it would be bizarre to believe that the employer discriminated against the individual by reason of youth.

[11] It is conceivable that in an employment discrimination case under the ADEA or other applicable law in which there was compelling direct evidence of discrimination by reason of age, race, or some other interdicted factor that the mere fact that a replacement worker is in the same protected class as the terminated employee would not mean that the employer could not be liable under the statute involved. See Williams, 733 A.2d at 578. After all, the employer after discharging the employee might find that the only suitable replacement employee was in the same protected class and thus hire that replacement employee. In that event it would be difficult to conclude that the employer should not be liable for the wrongful discharge.

C. "SIMILARLY SITUATED"

Frequently courts apply the McDonnell Douglas burden shifting analysis when an employer replaces an employee. But here we deal with that analysis in the different context of a reduction in force. In Anderson, 297 F.3d at 250, we explained that in the first step of the burden shifting analysis in a reduction-in-force case brought under the ADEA, "the plaintiff must show, as part of the fourth element, that the employer retained someone similarly situated to him who was sufficiently younger." We reasoned that unless the fourth element required the individual retained to be similarly situated to the one who was terminated we would be construing the ADEA as a bumping statute guaranteeing employment to a protected worker at the expense of a sufficiently younger employee. Id.

In the absence of divergent language between the NJLAD and federal discrimination laws, the Supreme Court of New Jersey has applied federal standards in NJLAD cases "in the interest of achieving a degree of uniformity in the discrimination laws." Sisler, 723 A.2d at 950; see Lawrence v. Nat'l Westminster Bank N.J., 98 F.3d 61, 65 (3d Cir. 1996) ("[a]ge discrimination claims under the ADEA and [NJ]LAD are governed by the same standards and allocation of burdens of proof") (citations omitted). Inasmuch as there is no applicable divergent statutory language in this case, and taking into consideration the references in Sisler to the age of replacement employees, we believe that if faced with a case of age discrimination in the context of a reduction in force, the

Supreme Court of New Jersey would adopt the similarly situated requirement of Anderson.

In Anderson, 297 F.3d at 250, we held that non-union employees were not similarly situated to "entry-level positions or other low-level positions without providing any evidence of [routine job] shuffling." We affirmed the decision of the district court granting summary judgment to the defendants as to certain plaintiffs "because the employees retained were either not sufficiently younger or the evidence failed to show that the duties were comparable or that they were otherwise similarly situated." Id.

In this case we are required to articulate further who is "similarly situated" for purposes of making out the fourth element of a prima facie case in a reduction-in-force situation under the NJLAD.[12] In accord with Anderson, we will not compare an individual such as Monaco, a vice president in charge of the Eastern Region, with lower-level employees without evidence of routine job shuffling which does not exist. See id. However, an individual does not need to be situated identically to satisfy the fourth element of a plaintiff's prima facie case under the NJLAD. In order to determine who might qualify as a similarly situated employee we must look to the job function, level of supervisory responsibility and salary, as well as other factors relevant to the particular workplace. This

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12 We do not suggest that the standard would be different under the ADEA. Rather, we merely recognize that this case insofar as it claims age discrimination is solely under the NJLAD.

determination requires a court to undertake a fact-intensive inquiry on a case-by-case basis rather than in a mechanistic and inflexible manner. See Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 357 (3d Cir. 1999).

Thus, we must determine which employees at AGAC were similarly situated to Monaco. AGAC maintains that Shaw, the vice president for the Western Region, who was two years older than Monaco, was the only individual it employed similarly situated to Monaco. Of course, there is no doubt but that Monaco and Shaw were similarly situated as they had the same job responsibilities, though for different regions, and Monaco does not contend otherwise. He does counter AGAC's argument, however, by contending that we should read the similarly situated requirement more broadly and also consider the eight sales vice presidents/branch managers whom he directly supervised to be similarly situated. The district court rejected Monaco's argument, finding that there was no evidence to suggest that sales vice presidents/branch managers were similarly situated. We agree with the district court.

Under Federal Rule of Civil Procedure 56(e), when a party has filed a motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Monaco states in his brief that he "should have been given an equal employment opportunity to fill a branch manager or district sales

position in which he had previously been employed." Appellant's br. at 20. However, in this litigation he has not produced any evidence to show that his position of vice president of the Eastern Region was similarly situated to that of the eight vice presidents/branch managers whom he directly supervised.[13] Monaco does maintain that he had the qualifications to serve in one of these positions, and clearly he was so qualified as he had held such a position prior to being promoted to vice president of the Eastern Region in 1988. But, as the district court in Anderson explained, "[m]erely because a plaintiff has met the standards for a particular position . . . does not mean that the plaintiff and the person who occupied that position were similarly situated for purposes of a prima facie age discrimination claim." Anderson v. Consol. Rail Corp., No. Civ. A. 98-6043, 2000 WL 1201534, at *5 (E.D. Pa. Aug. 9, 2000).

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[13] At oral argument, Monaco argued that the focus of his position as well as the eight vice president/branch managers was to solicit insurance through independent brokers. However, Monaco had supervisory responsibility over all of the offices in the eastern United States while each of the eight vice president/branch managers was responsible for his individual office. If we were to focus on the job responsibilities of Monaco's position at the level of abstraction which he suggests is appropriate, his position would be similarly situated to many entry level employees who solicited insurance. As we explained in Anderson, 297 F.3d at 250, this approach, if applied under the ADEA, would cause that statute, and, if applied under the NJLAD, would cause it as well, to require the "bumping" of lower level sufficiently younger employees in order to retain protected workers.

Monaco contends that if we adopt a narrow reading of the similarly situated requirement we will be inviting "mischief" by employers. Appellant's br. at 17. He argues that employers will manipulate reductions in force by first placing older workers into "dead-end" positions for a few months where there are no similarly situated individuals and then later terminating or laying off the older employees, thereby, according to Monaco's reasoning, avoiding liability for age discrimination.

We disagree. First, Monaco's case fails to present such a factual scenario. AGAC laid off Monaco after he had been employed as vice president of sales for the Eastern Region for many years and certainly it did not "shuffle" him into a dead-end position prior to the reduction in force. Second, as explained above, a determination of whether an individual can satisfy the "similarly situated" requirement triggers a fact intensive inquiry based on a whole constellation of factors facing that individual employee. Certainly if there was evidence that an employer transferred an older worker from his position to a new one which happens to have few similarly situated individuals soon before his termination, a court would be able to consider that circumstance in determining whether the employee established the fourth element of his or her prima facie case of age discrimination. See Marzano v. Computer Science Corp., 91 F.3d 497, 511 (3d Cir. 1996). But we reiterate that here there was no such transfer.

In view of the circumstance that Shaw was the only employee at AGAC similarly situated to him, Monaco's case under the NJLAD cannot be successful. In O'Connor, 517 U.S. at 312-13, 116 S.Ct. at 1310, the Supreme Court explained that under the ADEA an individual cannot make out a prima facie case such that a court will infer unlawful age discrimination if the employee is replaced with another worker who is "insignificantly younger." We subsequently have explained that in order to satisfy the sufficiently younger standard, "there is no particular age difference that must be shown, but while different courts have held . . . that a five year difference can be sufficient, . . . a one year difference cannot." Showalter v. Univ. of Pittsburgh Med. Ctr., 190 F.3d 231, 236 (3d Cir. 1999) (internal citation marks and citation omitted).

In fact Shaw, the vice president of the Western Region, is two years older than Monaco. Therefore, in the light of O'Connor, Showalter, and Sisler, Shaw's retention in this reduction-in-force situation cannot help Monaco establish the fourth element of his prima facie case. Indeed, the exact opposite is true. Furthermore, even if we make the unfounded assumption that Monaco was similarly situated to his supervisor Leary and to McKellar, the national vice president of sales who was hired ten months after Monaco's layoff, this assumption would not help him set forth a prima facie case.[14] Leary and McKellar

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[14] Significantly Monaco does not even ask us to make this assumption for in his brief, though he points out that Leary took over a portion of Monaco's supervisory functions for the Eastern Region, he indicates "the comparison sought is between the plaintiff who held an executive sales vice president position with

respectively were only three and two years younger than Monaco, a differential which does not satisfy the sufficiently younger standard O'Connor and Showalter set forth. Moreover, as Monaco acknowledged at his deposition, their levels within the company differed from his. Inasmuch as we agree with the district court that Monaco has failed to establish the fourth element of his prima facie case, we will affirm its grant of summary judgment as to Monaco's claim under the NJLAD.[15]

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other employees who held executive sales vice president/branch manager positions, the very same job position the plaintiff previously held before he had been promoted to Vice President of the Eastern Region." Appellant's br. at 16. In his reply brief he adheres to this approach as he recites that he "should have been given the opportunity to compare his skills and work experience to employees holding executive sales position/branch manager at a level he had previously performed prior to being promoted to Regional Vice President." Appellant's reply br. at 2. Monaco's contention in his briefs, to the extent that he does not claim that Leary and McKellar were similarly situated with him, is consistent with his deposition testimony which was that, besides himself, Shaw was the only person "on the same level . . . within the company." J.A. at 125.

[15] In his complaint, Monaco asserted individual claims against Leary and the John Doe and Richard Roe defendants under N.J. Stat. Ann. § 10:5-12(e) (West 2002). He claimed that the individual defendants did "aid, abet, incite, compel or coerce the doing of any of the acts forbidden under [the NJLAD], or to attempt to do so." Id.; see J.A. at 54. In granting summary judgment in this case to all defendants the district court did not discuss this claim. However, inasmuch as we hold that the district court correctly granted summary judgment to the corporate defendants, any claim he brought against the individual defendants for aiding and abetting fails as well.

D. CONTRACT CLAIM

The AGAC employee handbook provides, in relevant part, that the company complies with "all applicable laws regarding equal employment opportunities without regard to . . . age . . . ." J.A. at 206. It further states that "[n]othing in this manual or in the company's policies, practices, or procedures should be read as a guarantee of employment, a commitment to provide employment, or a promise to continue any terms or conditions of existing employment." J.A. at 206. The handbook also makes clear that "[e]xcept where mandated by law, these policies and programs may be changed or discontinued at any time at the discretion of the company." Id.

Monaco maintains that the provision stating that AGAC complies with all applicable equal opportunity laws without regard to age created a binding contractual obligation between him and AGAC which it breached when it terminated him allegedly on the basis of age. The district court rejected this argument as it held that the language contained in the handbook "was no more than the language necessary to meet the statutory requirements of the NJLAD." J.A. at 8.

Our disposition makes it unnecessary for us to consider appellees' contention that they asserted a legitimate non-discriminatory basis for Monaco's termination which Monaco did not rebut and that for this independent reason are entitled to summary judgment.

Under New Jersey law, the employment-at-will doctrine provides that "an employer may fire an employee for good reason, bad reason, or no reason at all" unless prohibited by law or public policy. Witkowski v. Thomas J. Lipton, Inc., 643 A.2d 546, 552 (N.J. 1994); see also Silvestri v. Optus Software, Inc., 814 A.2d 602, 607 (N.J. 2003). Either party may terminate an employment relationship at will unless an agreement exists between the parties that provides otherwise. Varrallo v. Hammond Inc., 94 F.3d 842, 845 (3d Cir. 1996) (applying New Jersey law).

In certain circumstances, a company's employment manual contractually can bind the company notwithstanding its inclusion of a disclaimer of a creation of enforceable rights. Geldreich v. Am. Cyanamid Co., 691 A.2d 423, 426 (N.J. Super. Ct. App. Div. 1997). In order not to create a binding obligation on the company, the language in the manual "must be such that no one could reasonably have thought it was intended to create legally binding obligations." Id. at 427.

The only statement in the employee handbook to which Monaco points as creating a binding contractual obligation between him and AGAC is the general language on the same page as the table of contents that the company "complies with all applicable laws regarding equal employment opportunities without regard to . . . age . . . ." J.A. at 206; appellant's br. at 21. But this statement merely sets forth that AGAC strives to comply with its legal obligations, nothing more, and "no one could reasonably have thought it was intended to create

legally binding obligations," beyond those the law already imposed. Geldreich, 691 A.2d at 427.

If we were to agree with Monaco that the quoted provision could be the predicate for a breach of contract claim, individuals bringing employment discrimination cases in New Jersey where an employment manual contained such a provision could as a matter of course assert both statutory discrimination and breach of contract claims based on the employer's same underlying conduct. In order to prove the breach of contract claim the plaintiff would be required to prove the underlying discrimination claim by showing how the employer's actions violated the anti-discrimination laws. We reject Monaco's attempt to create two causes of action where he is only able to assert one. We are satisfied that New Jersey law does not provide a separate breach of contract cause of action on the basis of generalized anti discrimination language in an employee handbook where the alleged discrimination would be in violation of the NJLAD.[16] Such a breach of contract cause of action would add nothing to the statutory cause of action. Moreover, even if such a cause of action could exist, Monaco's case would fail because he cannot demonstrate that AGAC was guilty of age discrimination. We therefore

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[16] If the AGAC employee handbook stated that the company does not discriminate on the basis of some characteristic not covered by the NJLAD, then an individual might be able to assert a breach of contract claim on that basis. However, that is not the case here as the NJLAD prohibits the type of discrimination Monaco claims exists in this case and the language of the handbook merely states that AGAC complies with all applicable anti-discrimination laws.

will affirm the district court's grant of summary judgment on Monaco's breach of contract claim.[17]

IV. CONCLUSION

In reaching our conclusion we point out that the facts of this case demonstrate why a terminated plaintiff should not be able in a McDonnell Douglas burden shifting case to demonstrate a prima facie case of age discrimination without showing a difference in age between him or her and the replacement employee sufficient to support an inference of age discrimination or, in the circumstance that he or she was discharged in a reduction in force, showing that the employer retained someone similarly situated to him or her sufficiently younger to permit the drawing of such an inference. While we can understand Monaco's frustration after losing his position after so many years,

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[17] The district court held in the alternative that even if the language of the handbook could create a binding contractual obligation, two disclaimers in the handbook would have prevented Monaco from being able successfully to assert a breach of contract cause of action. However, as stated above, the only statement to which Monaco points as creating a contractual obligation between him and AGAC is the statement in the handbook that AGAC "complies with all applicable laws regarding equal employment opportunities without regard to . . . age . . . ." J.A. at 206. Clearly, AGAC could not disclaim its legal duty to comply with the NJLAD. Therefore, to the extent the district court relied on the disclaimer language in the AGAC handbook in granting summary judgment against Monaco on his breach of contract cause of action, it erred. But the error is harmless for, as stated above, the language in the AGAC handbook tracked the requirements of the NJLAD and did not create any binding legal obligations beyond those already established under the NJLAD.

the fact is that nothing in the record could support drawing an inference that age played any factor in AGAC's decision to terminate his employment. In view of all the reasons we have set forth, we will affirm the order of the district court granting summary judgment entered October 25, 2002.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-4190

ROBERT R. MONACO,
Appellant

v.

AMERICAN GENERAL ASSURANCE COMPANY, an Illinois corporation; AMERICAN GENERAL CORPORATION, a Texas corporation; WILLIAM LEARY; JOHN DOE; RICHARD ROE

On Appeal from the United States District Court
for the District of New Jersey

(D.C. Civ. No. 01-03642)

Honorable Mary Little Cooper, District Judge

Argued January 13, 2004

[ENTERED: FEBRUARY 23, 2004]

BEFORE: MCKEE, SMITH, and GREENBERG, Circuit Judges

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the district of New Jersey and was argued on January 13, 2004. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the order for summary judgment entered October 25,12002, is affirmed.

Costs taxed against appellant.

Attest:

/s/ Marcia M. Waldron
Clerk

Dated: February 23, 2004

RE: Monaco v. American General Assurance
Docket No. 02-4190

Certified as a true copy in lieu of a formal mandate on 3/16/04

Teste: /s/ Marcia M. Waldron
Clerk, U.S. Court Of Appeals for the Third Circuit

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROBERT R. MONACO,

Plaintiff,

v.

AMERICAN GENERAL ASSURANCE CO. et al.,

Defendants.

[ENTERED: OCTOBER 25, 2002]

MEMORANDUM AND ORDER

COOPER, District Judge

This matter comes before the Court on the motion of defendant American General Assurance Company ("American") on behalf of all defendants,[1] seeking summary judgment pursuant to Federal Rule of Civil Procedure 56. Plaintiff Robert R. Monaco, a

[1] The other defendants are American General Corporation, William Leary, and the fictitious defendants, John and Richard Doe. To avoid confusion, hereinafter, the term defendants will be used when referring to them as a party to this action, and American will be used when referring to that company and its actions.

former employee of American, alleges that American unlawfully discriminated against him on the basis of age, in violation of sections 11(a) and 11(e) the New Jersey Law Against Discrimination ("NJLAD"). N.J.S.A. §§ 10:5-12a & 10:5-12e. Plaintiff further alleges that the termination of his employment constituted a breach of contract. Defendants move for summary judgment on all claims. For the reasons expressed in this Memorandum and Order, the Court will grant American's motion.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff was born in 1946. (Monaco Aff. at ¶ 5.) At the time of the events giving rise to this action, he was 53 years old. (Compl. at ¶ 5.) Plaintiff began working for American's predecessor, United States Life Insurance Company ("United") in 1975, selling term life and medical insurance as a sales representative. (Id.) In 1979, plaintiff was promoted to the position of Regional Group Manager, and ten employees reported to him. (Id.) Plaintiff's title later changed to Regional Vice President - Eastern Region. (Monaco Aff. at ¶ 10.) American bought United in 1997, and plaintiff remained employed with American in the same position. (Pl.'s Br. at 7.) In 1998, due to sustained financial losses in the medical line of insurance products, American discontinued this line of services. (Def.'s Br. filed on 8-14-02 at 3.) The volume of sales in plaintiff's geographical area was severely affected. (Id.)

American combined the Eastern and Western regional offices in June 1999. (Monaco Dep. at 112.) At that time, there were two Regional Vice Presidents of

Sales at American: plaintiff for the Eastern Region and Robert Shaw, age 56, for the Western Region. (Def.'s Br. at 2.) Their positions were identical in scope.[2] (Id.) Eight branch sales vice presidents reported to plaintiff.[3] (Pl.'s Br. at 7.) In order to achieve the desired consolidation while simultaneously maintaining a senior management level sales presence in the West, American laid off plaintiff effective July 1, 1999 but retained Shaw in the Western regional office.[4] (Leary Cert. at ¶ 6.)

After plaintiff's termination, Shaw and William Leary ("Leary"), American's Senior Vice President of Sales and Marketing, who were both older than plaintiff, initially shared his responsibilities. (Def.'s Br. at 3.) Leary had been scheduled to relocate to New Jersey to establish an additional management presence there, but his move was delayed due to health reasons. (Leary Cert. at ¶ 9.) To replace Leary, American hired Tom McKellar ("McKellar") as National Vice President of Sales to be located in New Jersey. (Def.'s Br. at 4.) McKellar was approximately two years younger than plaintiff and, in addition to overseeing the Eastern

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2 Defendants assert that plaintiff and Shaw were, therefore, the only similarly-situated employees.

3 Plaintiff argues that these branch managers were similarly-situated and that he should have been offered one of their jobs after he was laid off. (P's Br. at 2.)

4 American already had senior level managers in its Eastern offices, including its President and other top level sales people. (Leary's Cert. at ¶ 6.)

regional sales offices, was responsible for national sales and other senior management duties. Id.

Plaintiff brought this action in the Sluperior Court of New Jersey, Monmouth County on June 11, 2001. (Pl.'s Br. filed on 15-02 at 5.) Plaintiff alleged that American discriminated against him on the basis of age in violation of sections 11(a) and 11(e) of the NJLAD. (Id.) in addition, plaintiff asserted a breach of contract claim against American. (Id.) Specifically, he claimed that American's employee handbook promised equal employment opportunities. (Id.) Plaintiff alleged that American breached this promise when, after laying him off, it did not provide him with the option of filling another Vice President position at the level of branch manager for which he claimed he was qualified.[5] (Id.)

Defendants removed this case to the United States District Court on August 2, 2001 and subsequently filed an answer and several affirmative defenses on August 9, 2001, denying any liability for violations of the NJLAD or any contractual claims. Id.

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[5] Branch managers were only responsible for one branch, as opposed to the entire region for which plaintiff had been responsible before his termination. Further, these branch managers had directly reported to plaintiff in his position of regional manager. Therefore, defendants argue that they were not similarly situated with plaintiff.

DISCUSSION

I. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the initial burden of showing that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met that initial burden, the non-moving party must present evidence that establishes that a genuine issue of material fact exists, making it necessary to resolve the difference at trial. Id. at 324; Jersey Cent. Power & Light Co. v. Lacey Township, 772 F.2d 1103, 1109 (3d Cir. 1985). A non-moving party, rather than rely on mere allegations, must present actual evidence that creates a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

In deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The role of the judge at the summary judgment stage is not to weigh the evidence, but to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249. "By its very terms, this standard provides that the mere existence of some alleged

factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Id. at 247-48. Material facts are only those facts that might affect the outcome of the action under governing law. Id. at 248; Boyd v. Ford Motor Co., 948 F.2d 283, 285 (6th Cir. 1991). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50 (citations omitted).

III. Plaintiff's Claims

A. The Breach of Contract Claim

Before addressing plaintiff's age discrimination claim, we will first dispose of his breach of contract claim. in his complaint, plaintiff alleges that American's employee handbook, distributed to him, contained (1) promises of job security based on equal employment opportunities; and (2) statements that American was aware of state and federal prohibitions against employment discrimination based on age. (Compl. at ¶ 27.) Plaintiff further claims that American denied him the privileges contained in the handbook, as well As "a contractual promise of equal employment opportunity" upon which he had reasonably relied. (Id. at ¶ 28.) As a result, plaintiff asserts that he has suffered monetary damages, including back pay, front pay, and loss of fringe benefits. (Id.)

Defendants, on the other hand, argue that plaintiff's breach of contract claim should be dismissed, because he was an employee at will and offered no evidence that an employment contract existed. (Def. Br. at 13.) They point to (1) plaintiff's deposition testimony, in which he conceded that he was an employee at will; (2) his inability to identify any provision or contractual right to job security or seniority, and (3) two disclaimers within the handbook denying the existence of any contractual rights. (Id. at 13-14.)

We agree with defendants, view. The general rule in New Jersey is that employment is at will and can be terminated at any time. See Pepe v. Rival Co., 85 F. Supp. 2d 349, 382 (D.N.J. 1999) aff'd 254 F.3d 1078 (3d Cir. 2001); Witkowski v. Thomas J. Lipto , Inc., 643 A.2d 546, 552 (N.J. 1994); Woolley v. Hoffman-LaRoche, Inc., 491 A.2d 1257, 1260 (N.J. 1985). Therefore, under the breach of contract theory, plaintiff had no right to continued employment when American decided to lay him off. Further, the Equal Opportunity Employment clause in the handbook did not create an additional contractual obligation. The language therein, containing American's promise not to discriminate against employees based on age, was no more than the language necessary to meet the statutory requirements of the NJLAD. (Pl.'s Br. at 14.)

In addition, no matter what language is contained in an employee handbook, any valid disclaimers as to contractual rights preclude lawsuits brought on this basis. See Woolley, 491 A.2d at 1258; Sellito v. Litton Sys., 881 F.Supp. 932, 936 (D.N.J. 1994). In this case, American's handbook contained two valid

disclaimers. One is located on its inside cover and provides that the manual does not create any legal obligations for the employer or legal rights for the employee with respect to continued employment. (Def.'s Br. at 14.) The second disclaimer, conspicuously located on the table of contents page, again points out that it should not be read as a guarantee of employment and that its terms could be changed or discontinued at any time. (Id.) Therefore, this Court finds that plaintiff did not raise a genuine issue of material fact with respect to his breach of contract claim.

B. The NTLAD Claim

Plaintiff mainly complains about American's alleged age discrimination in violation of the NJLAD. The NJLAD provides in pertinent part:

It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination: []For an employer, because of . . . age, to refuse to hire or employ or to bar or to discharge or require to retire . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment

. . . .

N.J.S.A. § 10:5-12.

1. Prima Facie Case

Discrimination claims brought under the NJLAD are generally analyzed according to the burden-shifting framework the Supreme Court articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and later clarified in Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). The parties do not dispute that Monaco's age discrimination claim should be resolved under this standard. The burden-shifting analysis proceeds in three stages.

First, the plaintiff must prove by a preponderance of the evidence a prima facie case of discrimination. Hicks, 509 U.S. at 506. To establish a prima facie case under the NJLAD, plaintiff must show that (1) he belongs to a protected category; (2) in performing his work he met his employer's legitimate expectations; (3) he nevertheless was fired; and (4) he was replaced by a significantly younger candidate to permit an inference of age discrimination. Pepe, 85 F. Supp. 2d. at 365.

If the plaintiff offers sufficient proof of the elements of a prima facie case, the court reaches step two. The burden of production, but not the burden of persuasion, shifts to the defendant, who must then offer evidence that is sufficient, if believed, to support a finding that it had a legitimate, nondiscriminatory reason for the employment action. Hicks, 509 U.S. at 506-07. If the defendant cannot satisfy that burden, judgment must be entered for the plaintiff. Id. at 509. If,

on the other hand, the defendant does satisfy that burden, then the court reaches step three. Here, the plaintiff must demonstrate by a preponderance of the evidence that the employer's explanation is pretextual, which, if shown, meets the plaintiffs burden of persuasion. Id. at 507-08.

For the reasons stated infra, this Court disposes of the case at the first stage and does not reach stages two and three. At the first stage, a plaintiff must prove by a preponderance of the evidence a prima facie case of discrimination. Hicks, 509 U.S. at 506. To establish a prima facie case under the NJLAD, plaintiff must show that (1) he belongs to a protected category; (2) in performing his work he met his employer's legitimate expectations; (3) he nevertheless was fired; and (4) he was replaced by a significantly younger candidate to permit an inference of age discrimination. Pepe, 85 P. Supp. 2d at 365. In reduction in force case ("RIF") such as this, the Third Circuit has modified the fourth element of a prima facie case. See, e.g., Showalter v. Univ. of Pittsburgh Ctr., 190 F.3d 231, 234-35 (3rd Cir. 1999). In such cases, a plaintiff must demonstrate that he was discharged while the employer retained similarly situated employees who are sufficiently younger than the plaintiff. Id. at 235.

The parties agree that plaintiff has shown the first three elements of his prima facie case. (Pl.'s Br. at 15.) With respect to the fourth element, however, plaintiff claims that he was discriminated against on the basis of age, when he was laid off while employees who were similarly situated and sufficiently younger were retained in violation of the Showalter standard. (Pl.'s Br. at 16.) Plaintiff is referring to the eight branch managers within the Eastern Region who reported to him until his termination. (Id.) He claims that he wrongfully was not considered for one of these positions, when they became vacant. (Id.)

To establish the fourth element of a prima facie case in RIF situations, plaintiff must show that the retained employees were both similarly situated and significantly younger. Plaintiff argues that the eight branch managers, four of whom were younger than plaintiff, were similarly situated. He claims that he was qualified to perform their jobs, and that American discriminated against him by laying him off, instead of offering him one of their positions.[6] (Pl.'s Br. at 5). We disagree.

Courts consider an employee's job responsibilities, duties, and managerial level when determining whether his position-was similarly situated to those of the retained employees. A case directly on point is Pepe v. Rival Co., 85 F. Supp. 2d 349 (D.N.J. 1999), aff'd 254 F.3d 1078 (3rd Cir. 2001). In Pepe, the plaintiff was a Senior District Manager who

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[6] A case Plaintiff never actually applied for any of these positions.

was replaced by a Regional Sales Manager. Id. at 370. In contrast to the plaintiff, the Regional Sales Manager was involved in the oversight of more sales accounts in different states and extensive administrative work. Id. Therefore, the court found that the two managers' positions were too different to be similarly situated and granted summary judgment to the defendant. Id. In this case, the differences are even greater. Whereas in Pepe, the District Sales Manager was responsible for one state and did not report to the Regional Sales Manager, the branch managers in this case were responsible for only one location and reported directly to plaintiff in his position of Regional Vice President. (Monaco Aff. at ¶ 9.)

Some courts have also held that employees on different levels of authority, seniority, responsibility, and hierarchy are not similarly situated. For example, in Anderson v. Conrail, No. 01-1518, 2002 U.S. App. LEXIS 14770 at *17 (3d Cir. July 23, 2002), the court rejected the plaintiffs' attempt to compare themselves with lower level positions. See also Mitura v. Daulton, No. 98-2006, 1999 U.S. Dist. LEXIS 3430, at *12, n. 6 (E.D. Pa. March 17, 1999)(noting that the plaintiff in a non- supervisory position could not establish unfair treatment because the supervisor who received better performance ratings was not similarly situated).

There is no evidence in this case to suggest that the Regional Vice President of Sales and the branch manager positions were similarly' situated. In fact, plaintiff testified that a branch manager is responsible for his own individual sales office, the sales representatives in that office, and the "quota" required

for that office. (Monaco Dep. at 130.) Conversely, a Regional vice President of Sales has global sales and managerial responsibilities. Plaintiff, in his position of Vice President of Sales for the Eastern Region, was responsible for coordinating insurance sales along the entire Eastern seaboard.[7] Furthermore, plaintiff was responsible for recruiting, hiring, and training new representatives or managers. (Monaco Dep. at 78.)

The Court concludes that plaintiff has not carried his burden to establish a prima facie case of age discrimination because he did not show that the younger retained employees were similarly situated to him.[8]

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[7] Offices in New Jersey, Connecticut, Boston, Philadelphia, Washington, D.C., New York, and the Southeast Region.

[8] We need not determine whether the position that eventually absorbed plaintiff's former duties, National Vice President of Sales, was a comparable position. This is because the individual selected to fill that position, Mr. McKellar, was only two years younger than plaintiff and thus was not significantly younger.

CONCLUSION

For the reasons stated, this Court concludes that there is no genuine issue of material fact with respect to plaintiff's contract claim. Further, plaintiff has not satisfied his burden of establishing a prima facie case of age discrimination against American. He has failed to establish that American retained significantly younger employees who were similarly situated to him. Therefore, defendants' motion for summary judgment will be granted and the complaint will be dismissed with prejudice.

IT IS THEREFORE on this 25th day of October, 2002, **ORDERED** that defendants' motion for summary judgment (no. 13-1 on the docket) be and hereby is **GRANTED**; and

IT IS FURTHER ORDERED that the within action hereby is **DISMISSED** in its entirety.

/s/ Mary L. Cooper
MARY L. COOPER
United States District Court

CHARGE 2.21

2.21 DISCRIMINATORY EMPLOYMENT PRACTICES UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION (*N.J.S.A.* 10:5-1 et seq.)
(Approved 5/91)

Note to Court

In a discrimination case, the burden of persuasion remains on the plaintiff throughout the case. However, unlike negligence cases, in a discrimination case, the burden of going forward shifts back and forth, with the preponderance burden applying only to the plaintiffs burden. Except in a "mixed motive" case, a defendant does not bear a burden of proof, but rather, bears only a burden of going forward.

The plaintiff must first establish by a preponderance of the evidence the specific prima facie case in question. Throughout the charges, the prima facie case will be referred to as the "initial" case. Note that it is plaintiff's burden to prove a prima facie case before the case can be decided by the jury. In most instances, whether some or all of the prima facie elements are show is a question for the court, as in any prima facie case; however, certain of the prima facie elements appear to be jury questions. The court should charge only the elements which are jury questions. It should be noted that with the exception of age cases (which are brought under the ADEA), the Federal Courts have not addressed whether the prima facie burden should be charged, simply because Title VII

does not permit a jury. Because a jury trial on discrimination cases is a new thing in New Jersey, there is, as yet, no published ruling in New Jersey as to the propriety of charging the prima facie burden.

Once plaintiff has established a prima facie case, the burden of going forward shifts to the employer to articulate some legitimate, non-discriminatory reasons for the challenged employment decision. The employer is not required to prove the validity of such a reason by the preponderance of the evidence, but need only articulate facts or produce evidence sufficient to raise a genuine issue of fact as to whether plaintiff was discriminated against.[1]

Once the employer has articulated a legitimate, non-discriminatory reason for its action, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the legitimate non-discriminatory reason articulated by the defendant was not the true reason for the employment decision, but was merely a pretext for discrimination. In order to return a verdict in plaintiff's favor on these claims, the jury must find that the legitimate business reason offered by defendant is pretextual.

The ultimate burden of proving that defendant intentionally discriminated against plaintiff remains at all times with the plaintiff. Only the burden of going forward shifts.[2]

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1 *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259-260 (1981); *Peper v. Princeton University*, 77 N.J. 55,83 (1978).

2 *Anderson v. Exxon*, 89 N.J 483, 493 (1982).

However, the case law has established that plaintiff should present both its *prima facie* proofs and its pretextual proofs as part of plaintiff's case in main.

Following this General Charge are several different, established formulations of the prima facie burden of proof for various forms of discrimination. The appropriate framework should be selected upon the particular case.

A. General Charge

The plaintiff in this case has charged that the defendants unlawfully discriminated against his/her in his/her employments because his/her (chose applicable categories: race, creed, color, national origin, age, ancestry, marital status, handicap, sex, or a typical hereditary cellular or blood trait or because of liability for service in the Armed Forces[3]). The New Jersey Law Against Discrimination states:

It shall be an unlawful employment practice[4]:

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[3] Although this provision of the statute does not expressly indicate that handicapped individuals are members of a protected class, this is made clear in N.J.S.A. 10:5-4.1 and 10:5-5(g). See Anderson v. Exxon, 89 N.J. 483, 492 (1982). If you are dealing with a handicap claim, you should include handicap as a protected class.

[4] N.J.S.A. 10:5-12, from which ths is excerpted, also covers other types of discrimination, such as liscrimination in housing, advertising, etc. This charge covers employment and only subsection (a) of 5-12 is quoted.

a. For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, sex, or a typical hereditary cellular or blood trait of any individual or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.[5]

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[5] Note the following statutory exceptions contained in N.J.S.A. 10:5-12, which need not be charged except where applicable:

> provided, however, it shall be an unlawful employment practice to refuse to accept for employment an applicant who has received a notice of induction or orders to report for active duty in the armed forces; provided further that nothing herein contained shall be construed to bar an employer from refusing to accept for employment any person on the basis of sex in those certain circumstances where sex is a bona fide occupational qualification, reasonably necessary to the normal operation of the particular business or enterprise.

To succeed on his/her claim, plaintiff must first establish by a preponderance of the evidence an initial case of discrimination on account of his/her (choose applicable categories: race, creed, color, national origin, age, ancestry, marital status, handicap, sex, or a typical hereditary cellular or blood trait or because of liability for service in the Armed Forces).

Option 1: **For use when there is no factual issue for the jury to decide as to the existence of any element of the *prima facie* case.**

I charge you that plaintiff has met his/her burden of proving the initial case here.

[or]

Option 2: **For use when there is a factual issue for the jury to decide as to the existence of one or more element(s) of the *prima facie* case.**

To establish an initial case in support of his/her claim, plaintiff must show by a preponderance of the evidence that:

[charge elements of *prima facie* cases from specific charges, *infra*.]

If you do not find the plaintiff has proven an initial case in support of his/her claim, then you must return a verdict for defendant.

[Assuming the employer has articulated some legitimate non-discriminatory reason for its action, charge as follows:][6]

If you find that plaintiff has proven an initial case, you must determine whether plaintiff also has satisfied his/her ultimate burden of proving intentional discrimination by defendant.

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[6] In the rare instance in which the jury must decide whether plaintiff has established an initial case, but defendant has not met its burden of going forward, charge only the following:

"If you find that plaintiff met his/her burden of proving an initial case of discrimination, then you must return a verdict in favor of plaintiff and against defendant because defendant has not offered sufficient evidence to refute plaintiff's proof."

CHARGE 2.22

Co., 747 F 2d. 885, 887-889 (3d Cir. 1984)

E. Discriminatory Layoff or Reduction in Force (RIF)

Plaintiff has contended that the layoff or reduction in force at [employer's name] was conducted in a discriminatory manner. In order to establish an initial case that a layoff was discriminatory, a plaintiff must show that:

1. He/She is a member of a protected class; and

2. He/She was laid off while others not in the protected class were treated favorably.[22]

It is plaintiff's burden to prove both of these elements by a preponderance of the evidence.

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22 *Mossarsky v. General Motors Corp.*, 706 F.2d 11 I (3d Cir.), *cert. den.*, 464 U.S. 937 (1983).

F. Wage Disparity under the NJLAD

1. Substantially Equal Jobs

Plaintiff has asserted that her[23] employer violated the [NJLAD/Equal Pay Act] by paying her lower wage than those paid to men for equal work.

> [Charge where applicable: The Equal Pay Act states:
>
> No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite 21 sex in such establishment for equal work.[24]

In order to establish an initial case of wage discrimination under the Equal Pay Act a woman must show that:

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23 Note that the EPA applies only to wage disparity as between the sexes. See *Grigoletti v. Ortho Pharmaceutical Corp.*, 118 *N.J.* 89,100 (1990).

24 29 U.S.C. § 206(d)(1).

B. Prima Facie Elements to be Included In Charge if Disputed in Particular Case

Note to the Court

When it comes to determining what should be required, if anything, to constitute the fourth element of the plaintiff's *prima facie* case, the Court needs to exercise a great amount of discretion and judgment to make sure that, in requiring a showing of this fourth element, the presence of such an element is absolutely necessary for a plaintiff to make out a case of discrimination. Thus, for example, the courts have generally held that, in a discriminatory discharge case, it is not necessary that the plaintiff establish, as part of his/her prima facie case, that he/she was replaced by someone outside the protected class. *See, e.g., Viscik v. Fowler Equip. Co. Inc.*, 173 *NJ* 1 (2002) (holding that "[t]he precise elements of a *prima facie* case must be tailored to the particular circumstances"); *Williams v. Pemberton Twp. Public Schools*, 323 *NJ Super.*, 490, 502 (App. Div. 1999) (holding that "[i]n light of the various contexts in which employment discrimination claims arise, we consider it unwise to require a plaintiff to establish unfailingly as part of the *prima facie* case that plaintiff was replaced by an individual outside the plaintiff s protected class[; t]he appropriate fourth element of a plaintiff s prima facie case requires a showing that the challenged employment decision (*i.e.*, failure to hire, failure to promote, wrongful discharge) took place under circumstances that give rise to an inference of unlawful discrimination[; t]hat

formulation permits a plaintiff to satisfy the fourth element in a variety of ways."

Discriminatory Treatment in Compensation, Terms, Conditions or Privileges of Employment

1. The plaintiff is a member of a protected class; and

2. The plaintiff was treated less favorably with respect to *[insert description of compensation, terms, conditions or other privilege that is basis for discrimination claim]* than workers who were similarly situated but who were not *[insert the protected category]*.

Discriminatory Discharge or Demotion

1. The plaintiff is a member of a protected class;

2. The plaintiff was performing his/her job at a level that met defendant's legitimate expectations;

3. The plaintiff was nevertheless fired or demoted; and

4. The plaintiff was replaced by a worker not in the protected class.

or

4. Non-protected workers with comparable work records were retained when the plaintiff was fired or demoted.

or

4. The plaintiff was terminated or demoted under circumstances that would give rise to an inference of discrimination.